IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 154

RONALD JAMES, *et al., Appellants*

v.

ANITA VALTIERRA, *et al., Appellees*

No. 226

VIRGINIA C. SHAFFER, *Appellant*

v.

ANITA VALTIERRA, *et al., Appellees*

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Now come The National Urban Coalition, the Alliance for Labor Action, the American Federation of Labor and Congress of Industrial Organizations, the American Institute of Architects, the Lawyers' Committee for Civil Rights Under Law, the National Association for the Advancement of Coloured People, the National Association of Building Manufacturers, the National Association of Home Builders, the National Association of Intergroup Relations Officials, the National Committee Against Discrimination In Housing, the National Housing Conference, the National Tenants Organization, the National Urban League, the Pacific Southwest Regional Council of the National Association of Housing and Redevelopment Officials, the Rural Housing Alliance, and Suburban Action Institute, and respectfully request that this honorable Court grant permission for the filing on their behalf of the brief *amicus curiae* accompanying this motion.

Petitioners are national or regional organizations, all concerned with the inability of a substantial segment of our society to obtain adequate housing in desirable locations. The specific interest of each separate organization is set forth in more detail in the body of the brief accompanying this motion.

Because the petitioners are national or regional in nature they are able to discuss the issues of this case in the broad factual context of national housing problems, and to demonstrate that the California practices held invalid by the court below have a severe impact on our country's attempt to provide adequate housing for all its citizens.

Petitioners requested consent to the filing of a brief *amicus curiae* from all parties to these proceeding but consent was refused on the part of the Appellant Shaffer and the Appellant James et al.

FRED P. BOSSELMAN
122 South Michigan Avenue
Chicago, Illinois 60603

FRANK I. MICHELMAN
Langdell Hall
Cambridge, Massachusetts 02138

Of Counsel:

CHARLES L. EDSON
1430 K Street, N.W.
Washington, D.C. 20005

HERBERT M. FRANKLIN
2100 M Street, N.W.
Washington, D.C. 20037

October, 1970

INDEX

TABLE OF AUTHORITIES

CASES

CALIFORNIA CONSTITUTIONAL PROVISIONS

STATUTES AND REGULATIONS

STUDIES, REPORTS, MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 154

RONALD JAMES, *et al., Appellants*

v.

ANITA VALTIERRA, *et al., Appellees*

No. 226

VIRGINIA C. SHAFFER, *Appellant*

v.

ANITA VALTIERRA, *et al., Appellees*

On Appeal From The United States District Court For The Northern District of California

Brief Of The National Urban Coalition, et al.

The organizations who have joined together to file this brief represent a wide range of people in the United States who produce and design housing, who administer or provide technical assistance with respect to subsidized housing, and who are the intended beneficiaries of such programs. They share a common concern that a substantial segment of American society is unable to secure adequate housing in a suitable environment and believe that the California practice held invalid by the Court below has a severe impact on the achievement of national housing goals.

THE INTEREST OF THE AMICI

The National Urban Coalition

On August 24, 1967, at an emergency convocation in Washington, D.C., a group of 1,200 persons issued an urgent appeal on the urban crisis to all concerned Americans. They were men and women of diverse interests. Yet they joined together in a national effort to mold a new

political, social, economic and moral climate to help break the vicious cycle of urban poverty and the ghetto. This convocation began The National Urban Coalition.

The Coalition is governed by a steering committee of industry, civil rights, labor, and church leaders and mayors.

The emergency convocation called upon the nation to take bold and immediate action to provide "a decent home and a suitable living environment for every American family" with guarantees of equal access to all housing, new and existing. The Coalition has advocated appropriate public and private action to move toward these objectives, and has stimulated the collaboration of other organizations on this issue of common concern. The Coalition has provided technical assistance to local urban coalitions, particularly to make the public housing program a focus of national and local reform efforts. It believes that affirmance of the District Court's holding is vital to the success of these efforts.

Alliance for Labor Action

The Alliance for Labor Action (ALA), a voluntary unincorporated association of labor unions, with a membership of approximately 4,000,000 workers in the United States and Canada, was formally established in May 1969 at a founding conference attended by more than 500 delegates from the United Automobile Workers (UAW) and the International Brotherhood of Teamsters. In August, 1969, the International Chemical Workers Union of Akron, Ohio and in April 1970, the National Council of Distributive Workers of America, affiliated with the ALA.

ALA was organized to assist all bona fide labor organizations which are prepared to cooperate in and contribute to joint efforts to advance the interests of workers and their families and to join with others in the community to promote the general welfare and to improve the quality of life for all Americans.

ALA also devotes its efforts and contributes its resources

to the task of organizing the unorganized, strengthening collective bargaining and to dealing with critical political, social and economic problems. More than two dozen ALA supported community unions and self-help organizations across the nation are now involved to some extent in programs which seek to improve the quality and quantity of housing for low and moderate income groups. ALA also purchased stock in the National Corporation for Housing Partnerships of Washington, D.C.

At its founding conference, ALA pledged "an all out effort at the national and community level to mobilize the national commitment needed to meet and solve the housing needs." Further, ALA seeks to work with all concerned groups in a cooperative effort to maximize community participation, to contribute seed money and to cooperate in making pension funds available for the financing of housing, and to give special emphasis to the special housing needs of retired workers, low and moderate income families and of migratory workers.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a Federation of 121 national and international labor unions representing 13,500,000 working men and women. The AFL-CIO is firmly committed to the proposition that improvement of housing conditions in this country is a vital national priority. The Federation has, therefore, worked to secure legislation at both the State and Federal level for a sound over all housing program including public housing for the poor. The decision below furthers the cause of providing decent living accommodations for every American and it is for this reason that the AFL-CIO joins in this *amicus* brief seeking affirmance of the decision below.

The American Institute of Architects

The American Institute of Architects is a professional

society representing approximately 24,000 licensed architects. The AIA has consistently supported Federal and state legislation aimed at fulfilling the nation's housing needs. The lack of decent housing for low and moderate income families has been of particular concern to the architectural profession. Accordingly, the Institute believes that the U.S. Supreme Court's disposition of the voter referendum issue in the Valtierra Case will be a significant precedent in the effort to provide suitable housing for all Americans.

The Lawyers' Committee for Civil Rights Under Law

The Lawyers' Committee for Civil Rights Under Law, a non-profit private corporation organized in 1963, has become increasingly concerned with urban problems. In 1968, the Committee initiated an Urban Areas Project with the aid of a grant from the Ford Foundation. In close cooperation with the National Urban Coalition, the Committee's national and local offices have actively engaged the service of lawyers in an attack upon urban problems in such areas as housing, education, and economic development. In the field of housing, it has been concerned with a number of critical problems, including rights of tenants for hearings prior to adoption of rent increases, the location and racial composition of proposed public housing projects, and recently, several of its offices have become particularly active in contesting the constitutionality of suburban government practices which restrict the availability of low income housing. The Committee's interest in the present case arises from these concerns.

National Association for the Advancement of Coloured People (Special Contribution Fund, Inc.)

The National Association for the Advancement of Coloured People, organized in 1909, is the oldest and largest civil rights organization in the country. It has a membership of 470,100 persons in 1,700 branches located in the 50 states. The principal objective of the organization is

to ensure the political, educational, social and economic equality of Negro citizens. It endeavors to remove all barriers of racial discrimination through the democratic process. The NAACP attempts to make the legal and political system responsive to the needs of the Negro minority. Negroes, however, by being effectively excluded from suburbia, are unable to inject themselves into suburban communities and are thereby denied an opportunity to resist these exclusionary practices. A requirement that public housing be put to referendum under these circumstances insures that Negroes will continue to be contained in the inner city ghettoes.

National Association of Building Manufacturers

The National Association of Building Manufacturers was established in 1943 (as the Prefabricated Home Manufacturers Institute) in response to the need for fast, low cost defense buildings.

With the rapid growth of industrialized building, the Association has grown in 18 recent months from 77 to 330 member firms, including 180 building material supplier companies and 140 building manufacturers producing homes, apartments, classrooms and other commercial buildings.

The National Association of Building Manufacturers believes that the shortage of decent housing for all American families is the greatest crisis facing the nation. In 1969 members of the Association produced 287,000 dwelling units, as well as a wide variety of other structures. The goal and slogan of the Association is "Housing America."

The Association believes this goal would be advanced by upholding the decision of the District Court.

National Association of Home Builders

National Association of Home Builders of the United States ("NAHB") is the trade association of the home building industry. Its membership, totaling approximately

51,000, is affiliated in 480 local and state associations and represents builders of both single family homes and apartments. It is estimated that the members of the Association build approximately two-thirds of all homes and apartments constructed by professional builders in the United States.

It has long been NAHB's basic objective to strive toward the goal of a decent home for every American family. While it believes this can best be accomplished through maximum reliance on private enterprise, the Association recognizes that a portion of the total housing need can only be met by governmentally funded or assisted projects.

As a matter of basic principle, NAHB is opposed to any statute requiring prior approval by referendum of the residents of any community as a condition precedent for construction of additional housing within that community. Such a condition, if permitted, would quickly become a serious addition to the many obstacles obstructing attainment of the objective of proper housing for the American people. Only too often local municipal ordinances and referenda constitute, in effect, a potent method either to prevent entirely construction of homes or apartments for low and middle income families or to bring about discrimination on an economic basis between families in the community. NAHB, therefore, joins in urging the Court to upold the action of the District Court in finding Article XXXIV patently unconstitutional.

National Association of Intergroup Relations Officials

The National Association of Intergroup Relations Officials is a non-profit corporation which was created in the state of Illinois on November 12, 1948, and now maintains a national office in Washington, D.C.

NAIRO is a professional association concerned with advancing intergroup relations, knowledge and skills, and improving the standards of intergroup relations practice,

and furthering the understanding and acceptance of the goals and principles of intergroup relations work. It publishes a professional journal and newsletter. It conducts professional conferences, and it serves in an advisory capacity to government and private agencies.

NAIRO has maintained a continuous interest in many aspects of housing and many of the articles in the Journal of Intergroup Relations, the professional publication of NAIRO, have related to housing problems, particularly in the fair housing field. NAIRO has sponsored several local and national conferences relating to housing and community development.

National Committee Against Discrimination In Housing, Inc. (NCDH)

Founded in 1950, the National Committee Against Discrimination in Housing, Inc. (NCDH) is a non-profit public interest organization working to achieve a slum-free, ghetto-free America in which every family secures a decent home in an open housing market with maximum freedom of choice. Program activities include consultation and technical assistance, direct field services, research, demonstration projects for developing new approaches and techniques, conferences, fact-finding and publication, including the preparation, interpretation and distribution of accurate and current information in the housing civil rights field. The program is carried out in cooperation with 47 national civil rights, religious, labor and civic organizations.

NCDH has long been deeply involved in and concerned with the danger to our democracy arising out of discrimination and segregation in housing. It believes that white suburban communities must not be allowed to build walls against the entry of the poor and minority citizens. For these reasons it joins this brief against a state constitutional provision which reinforces the power of local communities to bar housing for the poor.

National Housing Conference

The National Housing Conference is a non-profit citizens organization focused primarily on generating leadership and support for progressive Federal legislation on housing, urban renewal, and related community development. Its membership and its Board of Directors represent a cross-section of national, professional, and community leaders committed to this legislative cause.

Since its formation in 1931, and especially since World War II, the Conference has germinated the concepts behind most of the basic legislative advances which constitute the life-blood of housing and community development. The National Housing Conference also has played a most significant role in developing the public and political understanding and support essential for the enactment of these legislative advances.

Because the National Housing Conference has always represented the broad public interest in its field, it has earned the confidence and respect of Congressional leaders on housing and related legislation. It provides advice and guidance on legislation to a wide spectrum of national public interest organizations and works closely with Federal and local administrative officials. The National Housing Conference also cooperates with private enterprise groups on issues of common interest.

The National Housing Conference has always strongly supported the expansion and improvement of the low-rent public housing program, and it believes that upholding the result below will contribute to that objective.

National Tenants Organization

The National Tenants Organization is a corporation of nation-wide membership whose purpose is to promote and further the legal, social, political, and economical rights of all poor and exploited tenants throughout the nation. The National Tenants Organization has approximately 200 affiliated local tenant organizations in 25 states which

represent several hundred thousand tenants. A major portion of these tenants are public housing residents and/or applicants, and most of the individual members are living in deplorable housing. One of the primary objects of these tenants is to cause a large increase in the number of government financed housing units available to the poor generally, and more particularly, an increase in such housing in desirable communities. Consequently, the National Tenants Organization has a vital concern in this litigation challenging the California referendum requirement for construction of new public housing.

National Urban League, Inc.

The National Urban League is a professional community service organization seeking to secure equal opportunity for Negro citizens and other disadvantaged persons.

The National Urban League is a non-profit corporation whose national headquarters is located at 55 East 52nd Street, New York, New York 10022. It has regional offices in New York, Los Angeles, Atlanta, Akron and St. Louis. It also has a Washington bureau located in Washington, D.C. It has affiliates in 97 cities and is non-partisan and interracial in its leadership and staff. A trained, professional staff conducts the day-to-day activities of the League, applying expert knowledge and experience to the resolution of social problems.

A primary goal of Urban League affiliates in housing and urban development is to create opportunities for choice of living environments for lower income, moderate income and minority families. Other goals are to provide opportunities for minority entrepreneurs and workers in housing development projects.

The Urban League's housing program represents consumers and communities in the use of government housing programs and aids in private development system. Many of the 97 Urban League affiliates have formed non-profit development corporations to initiate and participate in housing and community development and to negotiate with

private and government agencies (national, state and municipal) to promote their goals in development.

These affiliates consider their housing work to be in the context of a national network of mutually interacting national and local strengths for developing and using tools to accomplish NUL housing goals of rehabilitation and new housing. They seek to participate in the development of standard housing for all persons.

The Pacific Southwest Regional Council of the National Association of Housing and Redevelopment Officials

The Pacific Southwest Regional Council of the National Association of Housing and Redevelopment Officials is the professional association of public officials of local housing and redevelopment agencies in the States of California, Arizona, Nevada and Hawaii and the Territory of Guam. Membership in the Council includes officials from 55 local housing authorities in the State of California, all of whom administer low rent housing programs adversely affected by the California constitutional provision which is the subject of this appeal.

Rural Housing Alliance

The Rural Housing Alliance is a non-profit membership corporation organized in 1966 following the convening of the First National Self-Help Housing Conference in Warrenton, Virginia. Organized initially as the International Self-Help Housing Association, the organization was established to serve as a clearinghouse of information on self-help housing. In the spring of 1969, the organization changed its name to the Rural Housing Alliance, reflecting the expanding organizational concern with the variety of housing and community needs in small towns and rural areas.

RHA provides assistance to local groups through publications, demonstrations, workshops, correspondence and consultation. Field staff members work directly with groups

engaged in developing low income housing projects. In addition, research information and educational materials are disseminated through bulletins, newsletters, booklets, handbooks, pamphlets, reports, films, and through other available media.

Suburban Action Institute

Suburban Action is a nonprofit foundation supported organization for research and action in the suburbs. It was established in May, 1969, to focus public attention on the role of the suburbs in solving metropolitan problems of race and poverty.

The goals of Suburban Action include: opening suburban land to low- and moderate-income and minority group families, and creating new opportunities for linking suburban jobs and unemployed and underemployed residents of central city slums and ghettos. It supports the result below as contributing to these goals.

To help achieve these goals, Suburban Action undertakes programs in housing, employment, land use and municipal taxation and carries out the research needed to support these programs. Suburban Action believes in the need to remove constraints to the development of decent housing, near job opportunities that can be afforded by disadvantaged groups in urban America.

SUMMARY OF ARGUMENT

As the briefs of the parties fully set forth the proceedings below, amici will not repeat them here. Briefly stated, the United States District Court for the Northern District of California voided Article XXXIV of the Constitution of the State of California, which required a referendum for the construction of each public housing project in that State. The court below correctly invalidated Article XXXIV on summary judgment. By proceeding thus directly to the constitutional issue, the District Court conveyed its conclusion that Article XXXIV, purely by virtue of the plain meaning

of its words, is so patent and irredeemable an infringement of constitutional rights as to make a trial irrelevant. Thus Appellant Shaffer's argument (Appellant's brief, pp. 25-31) that the factual record below was inadequate is beside the point.

The sharply discriminatory design of Article XXXIV is obvious and not denied. It provides that "No low rent housing project shall hereafter be developed . . . by any state public body until a majority of the qualified electors . . . approve such project by voting in favor thereof . . ." Its precise purpose is to subject all low-income public housing proposals, but not housing distinguishable only by the wealth of the intended occupants or the sponsor's identity, to the hazards of referendum. Lest there be doubt of their purpose, the draftsmen defined "low rent housing project" to mean any development of housing "for persons of low income," financed or assisted by the state or federal government, and went on in even more detail to define "persons of low income" as "persons or families who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding." A more explicit purpose to discriminate against the poor can hardly be conceived.

Given the discrimination inherent in Article XXXIV, the constitutional issue it presents can be very narrowly stated. We may assume (because Article XXXIV itself assumes) that every public low-income housing proposal sent to trial by referendum complies with all local codes applicable to physically similar private housing. We may further assume (because Article XXXIV itself assumes) that every public low-income housing proposal submitted to the voters has already been judged desirable by the sponsoring local housing agency and by HUD (which must be persuaded to provide subsidy); and that it has, moreover, found favor in the normal political give-and-take of the local governing body (whose approval is required by California Health & Safety Code §34313).

Thus neither the validity of restrictive general codes nor the existence of an affirmative duty on any government's part to provide low-income housing is in issue in this case. The issue here is much narrower and easier: It is whether a State may require that proposals for low-income housing, and only low-income housing, be subjected to referendum even though such proposals meet the requirements of local codes, the local housing authority, the local governing body, and the United States Department of Housing and Urban Development.

That the burden imposed by Article XXXIV discriminates against public housing for the poor, as compared with all other housing, is explicit. Less explicit, but equally apparent, is the adverse impact on minority groups who make up a disproportionately large segment of the "low-income persons" affected by the statute. The alleged reasons for the discrimination—the purported adverse physical, sociological or fiscal effects of low-income housing—fall apart upon examination. The only credible explanation for the discrimination is both irrational and invidious: the desire of white middle and upper class communities to bar from entry or continued residence in their areas the poor who cannot afford housing offered in the regular market. Because there is not even a rational basis for the discrimination, it is, *a fortiori*, not justified by any compelling state interest—the applicable standard in this case of explicit discrimination against the poor.

Not only does Article XXXIV discriminatorily and unjustifiably restrict the plaintiffs' housing opportunities, it also infringes another legally protected interest of plaintiffs—their right to full and fair participation in their locality's political process. Having established a general mechanism for participation in the political process, the state may not bias that process in a manner that arbitrarily restricts the opportunities or dilutes the influence of any class of substantially interested citizens.

In addition to violating plaintiffs' rights under the equal protection clause, discussed above, Article XXXIV violates

the plaintiffs' interest in free travel and migration, an interest which occupies a constitutionally protected status quite apart from equal protection. This court has once held that California may not prohibit directly the immigration of indigents; it should not be permitted to evade this ruling by indirection.

Finally, we point out that the ultimate effect of Article XXXIV and other local approval requirements has been to cause low-income housing in metropolitan areas to be restricted to neighborhoods already occupied by the poor and minority groups. The benefits of the program have been effectively conditioned on the recipients' willingness to remain in segregated neighborhoods. By fostering segregated neighborhoods the local option aspects of the low-income housing program have deprived the plaintiffs of equal protection of the laws, and have accelerated what the Kerner Commission called the deepening racial division of America.

In summary, this case presents the Court with a provision of the California Constitution that:

a) On its face discriminates against the poor in their efforts to obtain a basic human need, decent housing, without advancing any rational, much less compelling, State interest;

b) inevitably discriminates against nonwhites and other minority groups who constitute a disproportionate share of the persons seeking subsidized low-income housing;

c) dilutes and debases the political voice of such groups; and

d) burdens the basic freedom of persons to travel and migrate throughout the nation.

The Court may uphold the decision below by drawing on any or all of these reasons. But it may not reverse the result below without rejecting all of them and, at the same time, contenancing a program of housing subsidies admin-

istered by California in a manner that unconstitutionally confines the poor and minority groups to their existing areas of residence.

ARGUMENT

I.

ARTICLE XXXIV DISCRIMINATES AGAINST AND INJURES THE POOR, BECAUSE IT EXPRESSLY SINGLES OUT THEIR HOUSING FOR SPECIALLY BURDENSOME TREATMENT WHICH CAN ONLY LIMIT THEIR HOUSING OPPORTUNITIES, NOT EXPAND THEM, AND CANNOT LIMIT THE HOUSING OPPORTUNITIES OF ANYONE WHO IS NOT POOR.

At the most superficial level, the class "discriminated against" by Article XXXIV might appear to be the local housing authorities—the sponsors of that housing which, for no rational reason, is singled out for uniquely onerous approval procedures. Yet no claim is made for constitutional rights on the part of the authorities. Article XXXIV is unconstitutional not because it arbitrarily restricts the freedom of the housing authorities, but because in so doing it inevitably restricts the opportunities of public housing eligibles to obtain decent, safe, and sanitary housing in the locale of their choice. Those who must suffer this restriction of opportunity are, by virtue of Article XXXIV's express words, "persons of low income."

Plaintiffs need not show that such a discriminatory restriction of opportuntiy was an objective explicitly acknowledged, or even intended, by the draftsmen of Article XXXIV. Invidious discrimination may be shown not only by inadequately rebutted inference from the actual results of a challenged state action or practice,[1] but also by

[1] Gomillion v. Lightfoot, 364 U.S. 339. Cf. Yick Wo v. Hopkins, 118 U.S. 356.

inadequate justification of the natural and foreseeable results of such practice.[3]

Appellant Shaffer, apparently analogizing the present case to Yick Wo v. Hopkins,[3] argues that Article XXXIV cannot be shown to have a discriminatory effect because the voters on many occasions have voted to approve public housing projects. The analogy, however, is inapt. Article XXXIV's true effect simply cannot be gauged statistically. To begin with, its effect is not adequately measured by the number of projects rejected by the voters, for such a measure ignores the number that were never submitted to the voters because of the expectation that they would be disapproved. (A. 21-24, 31-33). Obviously, no statistics are likely to record the number of projects that aborted in the minds of the housing authorities or local city councils without ever reaching the voters.[4]

---

[3] Cf. Harper v. Board of Elections, 383 U.S. 663; Griffin v. Illinois, 351 U.S. 12.

[3] 118 U.S. 356.

[4] A hint of what such statistics might show if they were available can be gleaned from a comparison of California with New York, a state of similar size which has no referendum requirements. These statistics illustrate the sharp reduction in public housing production that has taken place since 1950 when Article XXXIV was adopted.

	Dec. 31, 1950	Dec. 31, 1969
California	34,185 units	45,892 units
New York	33,306 units	92,258 units

U. S. Dept. of Housing and Urban Development, S101 Low-Rent Project Directory, Dec. 31, 1969, at pp. 32 ff. & 141 ff.; HHFA 4th Annual Report, 1950, p. 405. Both States have similar levels of poverty, measured by the 1969 level of AFDC recipients: 1,045,000 in New York, 1,122,000 in California. U.S. Bureau of the Census, *Statistical Abstract of the U.S.* 299 (1970). The San Francisco Regional Office of HUD reports that, based on inquiries already received after the lower court's decision in this case, "it is anticipated that many communities will seek approval of applications for new, or greatly expanded, permanent low-rent programs in California in the immediate future, particularly for turnkey development." HUD Housing Assistance Office, Region VI, Low-Rent Housing Production Forecast 4/1/70 to 12/31/70, p. ii. The contrast between New York and California with regard to public housing starts is not reflected in Federal Housing Administration programs for persons who are not poor. See n. 125, *infra*, and accompanying text.

More fundamentally, however, statistical proof is beside the point because discriminatory effect is endemic in Article XXXIV—unlike the ordinance in Yick Wo. Article XXXIV can operate only to defeat, never to promote, housing for the poor. It cannot impede the provision of housing for anyone else. It comes into play only when a project for housing the poor would otherwise have been allowed to go forward. That the full gravity of the poor's injury can in the nature of the case never be shown by statistics simply reflects that the discrimination against them is systemic and structural—not accidental, contingent, or situational.

Article XXXIV positively favors, facilitates, and encourages the registration of voter prejudices tending towards systematic bias against housing for the poor. In California, housing produced by a private developer must of course comply with valid zoning restrictions, subdivision regulations, and building codes. If multi-unit housing is proposed—high-rise or garden-type apartments, town houses, or row houses—it may perhaps be excluded from areas zoned strictly for single-family, detached residences (if such zoning is itself reasonable and in furtherance of some public purpose), but such housing is free to go into other residential districts.[8] The developer may have to pay for utilities extensions or connections, in accordance with either special assessments or an established fee schedule. Once these generally applicable conditions are met, however, the privately sponsored project may proceed without

[8] For example, multi-unit housing may be placed in use districts designated R-3 or R-4 under the zoning ordinance of the City of San Jose, as long as it complies with standardized requirements regarding building size, set backs and off street parking.. Zoning Regulations of the City of San Jose, §§9103.3, 9103.4, 9105.8-9105.11, 9106.41 (San Jose's ordinance has been adopted and amended pursuant to its home-rule charter, in the exercise of home-rule powers granted by Cal. Const. Art. XI, §§6, 8, 11. See San Jose Charter, §200. A similar result would be likely under an ordinance adopted pursuant to California's zoning enabling act, Cal. Gov. Code §§65800 ff., applicable to non-home rule municipalities, see Cal. Gov. Code §65803.)

any further or *ad hoc* legal clearance. But let an externally identical project—similar design, same location, same compliance with local regulations, codes, and fee schedules[6]—be proposed by a local housing authority for "persons of low income" and the trigger is pulled. Automatically there is required an additional, specific and positive clearance not only by the local governing body but also by the local electorate—acting in utterly discretionary (not to say capricious) fashion ungoverned by any ascertainable standards whatsoever, reasonable or unreasonable.

On the one hand, local voters *are not even called upon* to veto any housing proposals except those designed for persons of low income. On the other hand, local voters *are automatically required* to act, case by case, on exclusion of low-income public housing whenever proposed. A person specifically opposed to entry of low-income persons could not ask for a neater set of loaded dice. In this case, no less than in Reitman v. Mulkey,[7] the challenged state action must be considered in its "historical context" with full regard to the reality of its "ultimate effect." On such inspection, it appears that Article XXXIV's positive support for illicit voter prejudice goes well beyond that condemned in Anderson v. Martin.[8] There, minority candidates for public office were at least allowed to share the same ballot with white candidates, though not without having their race called to the voters' attention. Here, the poor's housing is required to go on the ballot without reference to other local housing or land use issues, in a

[6] Local Housing Authorities in California are fully subject to their host municipality's "planning, zoning, sanitary, and building laws." Cal. Health & Safety Code §34326. Such Authorities may, moreover, agree to make payments covering the full costs of all "services, improvements, or facilities" furnished by a municipality to or for the benefit of its housing developments. *Id.* §34401. See 42 U.S.C. 1410(i).

[7] 387 U.S. 369, 373.

[8] 375 U.S. 399.

scheme of special elections producing only losers—inasmuch as those who are forced to run can win nothing not automatically granted to those who are excused.

The logic of the situation is inexorable: community choice is on a one-way rachet. *Only* low-income housing is subjected to case-by-case veto; other housing, once it satisfies generally stated, reasonable community standards, is immune (or, implicitly, automatically approved). The record shows that low-income housing *will* be excluded on a significant number of occasions. (A. 34-37). It is thus inevitable under Article XXXIV that, in time, the implicitly perfect record of other, code-complying housing as compared with the (at best) spotty success of code-complying low-income proposals will raise an irresistible inference that low-income proposals are on the whole disfavored because they will house low-income persons. Sooner or later, things are bound to reach a pass at which this court will have to say, as it did in Whitus v. Georgia,[9] that "the opportunity for discrimination was present and we cannot say on this record that it was not resorted to . . ." [10]

In this regard, Article XXXIV is precisely analogous to an almost unimaginable statute which would allow an unlimited number of preemptory challenges against black or poor veniremen, while providing that other prospective jurors may be challenged only for cause. Neither the purpose nor the inevitable effect of that scheme would be in doubt, and the Court would not feel it necessary to see the data predictably pile up before condemning it.

---

[9] 385 U.S. 545, 552.

[10] This Court has often held that statistical data which are highly suggestive of systematic or deliberate invidious discrimination will shift to the defendant the burden of dispelling the inference of invidious intent—or of justifying the invidiously discriminatory outcome—a burden which can be carried only by showing that the challenged practice is necessary for some other, allowable and important, state purpose. E.g., Gomillion v. Lightfoot, 364 U.S. 339; Coleman v. Alabama, 389 U.S. 22; Whitus v. Georgia, 385 U.S. 545; Patton v. Mississippi, 332 U.S. 463; Norris v. Alabama, 294 U.S. 587.

II.

THE DISCRIMINATION CREATED BY ARTICLE XXXIV'S REQUIREMENT OF A LOCAL REFERENDUM FOR PROPOSED HOUSING, IF BUT ONLY IF IT IS PUBLIC HOUSING FOR THE POOR, IS ARBITRARY, INVIDIOUS, AND LACKING IN ANY RATIONAL BASIS.

To provide that some—but not all—housing proposals may go forward only if specifically and positively approved by local referendum, cannot be rational unless the specially burdened proposals are legitimately a matter of special concern to the community. Why would new housing be a matter of special concern to a community, simply because the housing is sponsored or developed by a local public body, is partially supported by federal funds, and is to be inhabited by persons of low income? The answer indicated by the language of Article XXXIV is that its backers were concerned primarily with the economic status of the people who would occupy public housing rather than with any aspect of the housing itself. The Article applies only to housing for "persons of low income," defined as "persons or families who lack the amount of income which is necessary . . . to enable them to live in decent, safe and sanitary dwellings, without overcrowding." Appellant Shaffer shrugs off this plain statement, however, and insists that the voters were really concerned about the physical, sociological and fiscal impact of public housing. We will deal in turn with each of these asserted concerns.

Physical Aspects.

Appellants speak darkly of the "institutional" quality and "mammoth" proportions of public housing. Yet no law of man or nature exempts privately sponsored developments from these sins, or decrees that public housing

must commit them.[11] The laws of man, in fact, explicitly incorporate appellant Shaffer's aversion to high-rise design.[12]

Both in California and throughout the nation the great majority of public housing projects now being constructed are not the massive high-rise projects conjured up by appellant Shaffer, but are small groups of townhouses or low-rise apartments that blend inconspicuously into their surrounding neighborhoods. The average public housing project built in California during the 1960-69 period contained 32.2 units as compared to the average project built during 1940-49 which contained 234.6 units.[13]

Moreover, the fact that some public housing authorities were in the past forced to build high-rise projects on inadequate land area is primarily the result of the confinement of public housing to the land-scarce central cities by devices such as Article XXXIV. This pattern is exemplified by the instant case. By preventing the construction of new housing for the poor in two of the fastest growing areas of the state, the City of San Jose and the County of San Mateo, Article XXXIV helps keep the poor from access to

---

[11] "In recent years . . . HUD has attempted, with some notable results, to encourage good design. . . . HUD has recently begun to place careful controls on project size, on use of high rise structures, on design, and has encouraged more flexible management, all in an effort to make future public housing projects more attractive." *A Decent Home*, Report of the President's Committee on Urban Housing 61 (1968). Under the "Turn-key" programs, design, development, and management of "public" housing can all be contracted out by the local housing authority to precisely those private firms which produce and manage housing developments not subject to referendum under Article XXXIV. See *Id.*, at 75-77.

[12] Sec. 207 of the Housing and Urban Development Act of 1968, P.L. 90-448, approved August 1, 1968, 82 Stat. 476, 504, provides that "except in the case of housing predominantly for the elderly, upon enactment of this paragraph, the Secretary shall not approve high-rise elevator projects for families with children unless he makes a determination that there is no practical alternative." 42 U.S.C.A. §1415 (11).

[13] Department of Housing and Urban Development, Report S-11A, Consolidated Development Directory, June 30, 1969, pp. 30-46.

the new jobs and services that these areas offer. The practical effect of these restrictions, as the Douglas Commission pointed out, has been to force the construction of the huge central city projects that Appellant Shaffer deplores:

> The general tendency in recent years on the part of too many public housing authorities has been to emphasize high-rise and large-scale apartment projects. *This trend has been caused by many factors, notably the refusal of the dwellers in the suburbs and in the outer and middle-class sections of the cities to accept public housing.* This, in turn, has driven public housing closer to the center of the cities where land costs are high. The high cost of land and the continued immigration of low-income families have then led public housing authorities to construct high-rise buildings in order to get as many housing units as possible on each acre of land. . . . *Suburbanites and middle-class residents who criticize the huge projects in the central city and who, at the same time, oppose any projects in their neighborhoods, should realize that their refusal to permit the diffusion of public housing is a major factor in creating the concentration they deplore.*[14]

In any case, Article XXXIV's discriminatory feature obviously cannot be justified by appeal to the community's interest in the physical aspects of housing. Evenhanded application of valid zoning and building codes would amply satisfy the undoubted public interest in construction quality, design, location, size, residential density, and allied matters.[15] If in fact Article XXXIV had been designed to control height or massiveness it would have been easy enough to phrase its scope in those terms, defining the housing subject to its provisions using standards such as height, floor area ratio or residential density, all of which are familiar subjects of local regulation. The fact that the scope of the Article was instead defined by reference to the income level of the housing's occupants rather than by the

---

[14] National Commission on Urban Problems, *Building the American City* 123 (1968) (emphasis added).

[15] Such codes are applicable to public housing. See n. 6, *supra*.

size or density of the housing makes it apparent that the real concern was people, not buildings.

Sociological Impact.

Appellants suggest that public housing is in a class by itself because it is controversial, tends to induce community anxieties, and is thought by many to have an adverse impact on its environment. We must of course look behind such characterizations. Objectively, nothing distinguishes public housing, as such, from physically similar private developments save the certainty that the occupants will have low incomes. Developments need not be concentrated in such masses as to create "ghettoes" in any sense, nor need they be administered in degrading or psychologically detrimental fashion.[16]

The programs treated as suspect by Article XXXIV are as amenable to enlightened and sensitive location and administration as are the "leasing," "rent supplement," and "236" programs favored by appellant Shaffer and

[16] "A viable housing project must have access to those facilities which are necessary if a family is to advance economically and socially; jobs for both chief and secondary wage earners; markets and convenience shopping; schools; resources for health and recreation. . . . Second, the design should be such that families can make the dwellings that they occupy their homes, and the project their neighborhood. Only if residents feel this way will they want to spend time and labor taking good care of their dwellings and working for the good character and appearance of the project. If design is to further this objective, it should make as much provision as possible for families to personalize their dwellings inside and out, as if they did, in fact, own them. . . . In order that families may come to feel that the project is their neighborhood, design should be conducive to "neighboring." This means that the arrangements of buildings and the design of space between (or within) buildings should permit the need of like people to form natural, informal groups. . . . They are best served when buildings are arranged in groups or clusters so as to multiply the opportunities for a small number to see each other and get acquainted. Entries, lobbies, corridors and common balconies should not be designed merely as passageways. They should also be designed to serve some of the social needs of people, including the need to neighbor."
U.S. Dept. of Housing and Urban Development, Low Rent Housing Manual, § 221.1, Exhibit 6, pp. 2-3.

exempt from Article XXXIV. To be sure, Californians have a right to insist that the best potential of public housing will always be realized in practice; but they do not have the right to implement that concern through a broadside discrimination against all public housing when finer-tuned and less onerous alternatives lie ready to hand through enactment at the state or local level of articulate guidelines and standards for housing design that would be applicable to all types of housing.[17]

If the concern is truly with the welfare of the residents, the City could impose requirements that the poor be amply represented on housing authority boards, or encourage the use of such innovative devices as the "Turnkey III" program under which public housing occupants can assume the status, responsibilities, and incentives of home buyers and home owners.[18]

By ignoring these or similarly focused alternatives, and resorting instead to a wholesale and indiscriminate categorization of all public housing for low-income persons as a matter of extraordinary community sensitivity, California invites the inference that she is pandering to the socio-economic stereotypes and prejudices of her citizens.[19]

Hunter v. Erickson[20] teaches that discriminatory use of the referendum cannot be justified as a means of taking the community's temperature, merely to find out the virulence of its prejudice.

Financial Aspects.

Appellants claim that public housing has adverse fiscal impacts on its host community. Even were this true, it provides no rational basis for discriminatory treatment

---

[17] A good example of such guidelines and standards may be found in the very public-housing proposition defeated by the San Jose voters in 1968, reprinted in the Brief of Appellants James et al., p. 5.

[18] See C. Edson, *Homeownership for Low Income Families*, 3 Monograph Series, National Legal Aid and Defender Assoc. 1, 7-12 (1969).

[19] Cf. Reitman v. Mulkey, 387 U.S. 369.

[20] 393 U.S. 385.

because public housing is indistinguishable in this regard from numerous other land uses not subject to mandatory referendum.

Taxpayers in communities having public housing may have to make a contribution in the form of property-tax net losses, but only if the statutory payment in lieu of taxes is less than the tax revenues would otherwise have been in the absence of the development of such housing.[21] But considering how many referendum-proof uses will render land totally immune from local taxation in California, without even an in-lieu payment to lessen the sting, California can hardly be said to have a policy of assuring local electorates a special opportunity to exclude projects whenever and because they threaten to remove land from local tax rolls. Land privately devoted to school,[22] Church,[23] museum, [24] and hospital [25] uses is tax-exempt, but owners are normally free to devote land to such uses—thereby depriving the community of that land's tax potential—without obtaining any specific permission, as long as the land is compatibly zoned. For example, anyone is free to devote to tax-exempt private school uses all land zoned R-1, R-2, R-3, or R-4 under the current zoning ordinance of the City of San Jose.[26] Moreover, it is at least doubtful whether a California locality may lawfully exclude such uses from its territory, even by a general revision of its zoning ordi-

[21] But this is the *only* special "subsidy" which need be exacted from the local fisc. Local housing authorities are empowered by Cal. Gov. Code §34401 to pay for the full costs of municipal services and facilities provided for the benefit of their housing developments. The debts of such authorities "are not a debt of the city, county, state, or any of its political subdivisions," are repayable only from authority revenues (rents plus federal contributions), and therefore are of no concern to local taxpayers. Cal. Health & Safety Code, §§34351, 34353.

[22] Cal. Const. Art XIII, §§1a, 1c; Cal. Rev. & Tax Code §§214, 214.5.

[23] Cal. Const. Art. XIII, §§1c, 1½; Cal. Rev. & Tax Code §206, 214.

[24] Cal. Const. Art. XIII, §1; Cal. Rev. & Tax Code §202.

[25] Cal. Const. Art. XIII, §1c; Cal. Rev. & Tax Code §§214, 214.7.

[26] Zoning Regulations of the City of San Jose, §§9103.1-9103.4.

nance, if its only reason is to avoid the burden of the tax exemption.[27] And it is clear beyond doubt that use of land for public purposes by the state, a county,[28] or a school district,[29] may not be substantially impeded by the "host" municipality, though land so used be thereby immunized from local taxation.[30]

It is significant that local housing authorities themselves have repeatedly been characterized by the California Supreme Court as agencies which act on the state's behalf, carrying out responsibilities of statewide concern.[31] Thus, far from effectuating any general California policy to allow local electorates a veto over the entry of tax-exempt land uses, Article XXXIV actually represents a sharp departure from the established California practice of requiring municipalities to make room for tax-exempt state and state-sponsored activities, whether they like it or not. A general policy to the contrary simply does not exist, and therefore cannot furnish a rational basis for Article XXXIV. Certainly there is no apparent reason (and appellants have offered none) why such a policy should be applied to public housing alone.

In any event, however, Appellant Shaffer has cited no support for the implication (Appellant's Brief, p. 33) that the payments in lieu of taxes made in connection with public housing will be lower than the hypothetical taxes that would have been collected if the housing had not been

---

[27] See California Continuing Education of the Bar, *California Zoning Practice*, §§5.15, 5.40, 8.64, 8.77 (1969).

[28] County of Los Angeles v. City of Los Angeles, 212 Cal. App. 2d 160, 28 Cal. Rptr. 32 (1963). See California Continuing Education of the Bar, *supra* n. 27, §8.59.

[29] Cal. Gov. Code §§53090-53095. See California Continuing Education of the Bar, *supra*, n. 27, §8.75.

[30] Cal. Const. Art. XIII, §1; Cal. Rev. & Tax Code §202.

[31] Drake v. City of Los Angeles, 38 Cal. 2d 872, 243 P.2d 525 (1952); Housing Authority v. City of Los Angeles, 38 Cal. 2d 853, 243 P.2d 515 (1952); Housing Authority v. Superior Court, 35 Cal.2d 550, 219 P.2d 457 (1950); Kleiber v. City & County of San Francisco, 18 Cal.2d 718, 117 P.2d 657 (1941); Housing Authority v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794 (1939).

tax exempt. In fact, it is impossible to determine what the taxes would have been since public housing is not assessed for tax purposes, and any assumption about what the tax assessment would have been is necessarily based on speculative theory.[32] It is a slender reed, indeed, on which to rationalize an avowed discrimination against the poor.

The assumption that in each case public housing has a negative impact on the local tax base may on examination not be intrinsically rational, and it is clearly not rational in relation to other tax-exempt uses that do not make payments in lieu of taxes.

Apart from the tax exemptions appellants also refer to fiscal burdens which public housing may impose on the community through its demand for municipal services. (Appellant's Brief, p. 35). Exactly why public housing should be expected to exert costlier service demands than physically similar, privately developed housing is left unexplained. No doubt there are persons in California who believe that "the poor," as such, tend to make special demands on such public services as law enforcement and sanitation—or on the public schools, perhaps, because "poor people have large families." Giving credence to such invidious stereotypes and speculations, they might choose to subject public housing to special clearance requirements because of the demands it threatens to make on the municipal service budget. Appellants claim no such

[32] A variety of appraisal techniques could, in theory, be applied to the situation. It has been pointed out, for example, that if low-rent units were appraised on the basis of capitalized net income after debt service the project might have no taxable value at all. If so, the payments in lieu of taxes would be a net gain to the local fisc even under Appellant's favored theoretical approach. See Fisher, Twenty Years of Public Housing 187-89 (1959). Moreover, it has also been forcefully argued that a very different method of calculating the local tax base effect of public housing might be used—how payments in lieu of taxes compare to the taxes collectible were the site to remain undeveloped. Applying this theory can lead to assumptions quite different from Appellant's. See *Id.* 190-193.

justification, however; and reasoning so tainted is in any event constitutionally unacceptable.[33]

---

[33] But assuming, *arguendo*, that the housing for persons of low income would impose some additional cost on local government, there would then be presented the serious question of whether a community may use maximization of local government revenues as a basis for closing its doors to additional residents. The logical extension of such reasoning would be to permit each local community to keep out all new residents and permit only tax-productive industrial or commercial uses, forcing on neighboring communities the burden of providing all residential services. The validity of exclusionary practices that burden the general public interest has been in doubt ever since the question was left open by this Court forty-four years ago in its landmark decision upholding a municipality's right to exclude factories from within its boundaries:

> It is said that the village of Euclid is a mere suburb of the city of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village, and in the obvious course of things will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere, with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public, if left alone, to another course where such injury will be obviated. *It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.*

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 389-90. (emphasis added). It should also be noted that the Supreme Court of Pennsylvania has recently found that the exclusionary ordinances of municipalities which limit new housing to single family homes on large lots do conflict with the general public interest:

> We . . . refuse to allow the township to do precisely what we have never permitted—keep out people, rather than make community

Appellants further argue that Article XXXIV, far from constituting a discrimination against public housing development, merely extends to such development certain "traditional controls" generally applicable to the contracting of public debt in California—controls from which public housing is supposed to have escaped by a freakish twist of judicial interpretation. (Brief of Appellant Shaffer, pp. 18, 34). This argument is specious.

The "traditional controls" are those imposed by Cal. Const. Art. XI, §18, generally forbidding any city, county, or school district to incur indebtedness exceeding one year's income without prior approval by its electorate. As consistently understood by the California courts and legislature, this prohibition has the clearly defined and limited purpose of allowing local taxpayers to protect themselves against official improvidence which might encumber their local unit's general revenue-raising powers.

That is why, as appellant points out, local voters are not required to approve indebtedness incurred for projects, such as highways, to be financed and paid for solely by the state and federal treasuries. It is why the referendum requirement *does* apply when a locality chooses to finance urban renewal projects through its *general-obligation bonds,* but *does not* apply when like projects are financed by redevelopment-agency *revenue* bonds.[84] And it is why the California courts have repeatedly adhered to the "special

---

improvements. . . . [C]ommunities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area. If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make.

Appeal of Kit-Mar Builders, 268 A.2d 765, 768-9 (Pa. 1970).

[84] See Cal. Health & Safety Code §§33621, 33630, 33633, 33644; Brief of Appellant Shaffer, pp. 48-49.

fund" doctrine, holding that a municipal bond issue is not "indebtedness or liability" within the purview of Art. XI, §18, if no legal obligation is thereby imposed on the municipality's taxpayers or taxing powers—the bonds being repayable only out of revenues in respect of the project to be financed by their proceeds—leaving the bondholders with no recourse against the general fund or taxing capacity of the issuing municipality.[35]

By virtue of Cal. Health & Safety Code §§34351, 34353, housing authority bonds partake exactly of the nature of those highway bonds and urban-renewal revenue bonds which, appellant agrees, are clearly beyond the scope of the referendum requirements of Art. XI, §18. Housing authorities may issue only revenue bonds. These are to be repaid from rent receipts and federal contributions and must state expressly that they are not obligations of the state or any political subdivision. Such bonds are, of course, classic examples of the kind of public debt to which California's "traditional controls" have never been deemed applicable. The California Supreme Court, flatly and without hesitation, held in Housing Authority v. Dockweiler[36] that housing authority bonds were not subject to the referendum requirement of Art. XI, §18, because such bonds, "being payable exclusively from the revenues or property of the project or projects which are constructed with their proceeds and with federal aid, would not constitute a debt within the meaning of the provision." This decision, routinely applying California's long-established special fund doctrine to housing authority revenue bonds, is one of two said by Appellant Shaffer to have created the referendum "loophole" supposedly plugged by Article XXXIV.[37]

But it is, of course, not the Dockweiler holding but Article XXXIV itself which (by in effect excepting housing-

---

[35] *E.g.*, City of Glendale v. Chapman, 108 Cal. App.2d 74, 238 P.2d 162 (1952); see City of Palm Springs v. Ringwald, 52 Cal. 2d 620, 342 P.2d 898 (1959); City of Redondo Beach v. Taxpayers, 54 Cal.2d 126, 352 P.2d 170 (1960).

[36] 14 Cal.2d 437, 94 P.2d 794, 806 (1939).

[37] See Brief of Appellant Shaffer, p. 18.

authority revenue bonds from the special-fund doctrine) is decidedly untraditional in California jurisprudence.[38]

Local Self-Government.

Some of the argument advanced by appellants suggests that Article XXXIV might be redeemed by its fostering of local self-government. On a strict view of what is involved in the instant case, this suggestion is not relevant to its disposition. In order to find a constitutionally repugnant discrimination in Article XXXIV, plaintiffs need not compare their situation with that of similarly circumstanced persons in some more enlightened locality. It is enough for them to compare the legal requirements applicable to *public* housing in San Jose and San Mateo with those applicable to other housing in those same places. The argument here is not that California has generally authorized its cities and counties to decide for themselves how their land should be used, but that California has authorized and required those localities to use a discriminatory device—the mandatory referendum applicable only to public housing—in making those decisions.[39] Obviously such a

[38] At the statutory level, the California legislature has enacted a Revenue Bond Law, Cal. Gov. Code §54300 et. seq., setting forth a procedure for issuance of municipal revenue bonds which includes a referendum. *Id.*, §54386. However, the Law does not restrict the borrowing powers of any home-rule charter municipality (such as San Jose and most other major California cities) or require such municipality to submit its revenue bonds to referendum, unless that municipality has affirmatively chosen to adopt the Law's provisions. See City of Redondo Beach v. Taxpayers, *supra.*, n. 35; City of Santa Monica v. Grubb, 245 Cal. App. 2d 718, 54 Cal. Rptr. 210 (1966). The Revenue Bond Law, therefore, does not set forth any general state policy which was "merely extended" to Housing Authority Bonds by Article XXXIV.

[39] Amici, nevertheless, doubt whether acceptance of low-income public housing can constitutionally be left to completely unfettered local option—even assuming, contrary to the case here, that it were exercisable only by the governing body. Amici believe that the practice of local option is inextricably bound up with the restriction of the poor's housing choices which occasions the instant attack on Article XXXIV. Accordingly, we discuss the local-option arrangement, and the related justification of local self-government, in Section VI of this brief.

complaint cannot successfully be met with a plea of "local self-government."

Popular Sovereignty and Majority Rule.

Appellants would have it appear that plaintiffs pit themselves unreasonably and paradoxically against the principle of majority rule—or that the court below has invoked the Equal Protection clause in opposition to the "right to vote." Appellants seem to believe—or hope—that you can smuggle any discrimination, no matter how invidious, right past the Equal Protection clause merely by wrapping it in the mantle of a popular vote. But Hunter v. Erickson[40] should have put a stop to that gambit.

A discrimination against public housing is no less a discrimination, and no less arbitrary, because the selectively and irrationally imposed burden consists of mandatory submission to a popular vote. There is no reason why use of the referendum process should be allowed to immunize from judicial inspection a state's arbitrary or invidious imposition of disadvantages. There is every reason why such use should not be allowed. Shall the poll tax be approved if, instead of absolutely excluding from the franchise those who fail to pay, we put the question in each case to the electorate? May prior-residence requirements for welfare applicants be resurrected by submitting to referendum all applications from new arrivals? Is it constitutional to require red-headed lawyers or restaurateurs, but not others, to go to the electorate for their licenses to practice or serve? It seems a sadly perverse employment of the democratic ideal to put it to such service. Appellants' pious incantations of "popular vote" and "majority rule" are but camouflage for the simple, deadly fact that the poor, still once again, are being saddled with a special burden.

Plaintiffs, be it noted, do not argue that there is anything discriminatory about the referendum or popular-vote process itself. They complain rather about the discriminatory imposition of procedural requirements. This can be illus-

[40] 393 U.S. 385.

trated by a hypothetical example. Suppose a state allowed housing developers to bypass local legislative approval by submitting their projects directly to the voters, but denied the availability of this procedure to developers of housing for persons of low income. Such a procedure would be equally as discriminatory as Article XXXIV, although the discrimination in such a case would consist of the *absence* of a referendum opportunity rather than the *presence* of a referendum requirement.

Conclusion.

We have considered the physical attributes of public housing, its partially tax exempt status, its reliance on public borrowing, its demand for municpal services; and we have dealt with claims of local self-government and popular sovereignty. The inherent fallacy in each facet of Appellant Shaffer's search for rational purpose in Article XXXIV only underscores the real discriminatory purpose which is emblazoned across the face of the Article—the placement of housing for "persons of low income" in a specially disfavored category.

III.

THE DISCRIMINATION WROUGHT BY ARTICLE XXXIV IS ESPECIALLY INVIDIOUS BECAUSE IT EXPLICITLY DISFAVORS THE POOR AND OPERATES TO THE DISADVANTAGE OF MINORITY GROUPS—ALL IN REGARD TO A BASIC NEED.

We have shown that Article XXXIV discriminates against the potential occupants of public housing as compared to occupants of housing of other types, and that there is no rational basis for this distinction. In this Argument III we will demonstrate further that because the discrimination adversely affects the poor and minority groups, and the more so because that discrimination affects a basic need, the discrimination must bear closer judicial scrutiny under the "compelling state interest" test—a scrutiny it cannot survive.

Discrimination against the Poor Requires Exacting Judicial Scrutiny

The case at bar is quite closely analogous to Hunter v. Erickson.[41] In Hunter, the Court concluded that a special referendum requirement for open occupancy ordinances—measures designed to relieve against race-related disadvantages—was "an explicitly racial classification treating racial housing matters differently from other racial and housing matters," and was thus a constitutionally disfavored *racial* discrimination, carrying a " 'far heavier burden of justification' than other classifications."[42]

Article XXXIV's special referendum requirement for housing for "persons of low income"—a program designed to relieve against poverty-related disadvantages—is as explicitly a discrimination against the poor as the law invalidated in Hunter was a discrimination against racial minorities. Obviously the persons to be benefitted by low-income housing are by definition poor, and if the housing is not built, it is the poor who suffer.

This Court has often held that discrimination against the poor requires a searching review by the courts. As this Court has stated: "a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, . . . two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[43]

Article XXXIV Operates to the Disadvantage of Racial Minorities

It is especially appropriate in a case like this one that a discrimination against the poor be regarded as no less invidious or specially suspect than a discrimination against a racial minority. For the fact is that racial minorities

[41] 393 U.S. 385.

[42] *Id.* at 389, 392.

[43] McDonald v. Board of Election Commissioners, 394 U.S. 802, 807. See also Griffin v. Illinois, 351 U.S. 12; Douglas v. California, 372 U.S. 353; and Harper v. Virginia Board of Elections, 383 U.S. 663.

constitute a disproportionate share of the persons seeking entrance to publicly-sponsored housing.

As amici will demonstrate in sections V and VI of this brief, the relevant "market" for low-income housing in Santa Clara and San Mateo Counties consists of all of those persons of low income who seek access to the rapidly increasing job opportunities and the educational and environmental amenities of this growing area. This market contains disproportionate numbers of non-whites and minority groups,[44] and these proportions will continue to increase because of the deplorable housing conditions to which many non-whites have been subjected in the past.

> During the decade of the 1950's, when vast numbers of Negroes were migrating to the cities, only 4 million of the 16.8 million new housing units constructed throughout the nation were built in the central cities. These additions were counterbalanced by the loss of 1.5 million central-city units through demolition and other means. The result was that the number of non-whites living in substandard housing increased from 1.4 to 1.8 million, even though the number of substandard units declined.[45]

As a result of this tragic backlog in housing for non-whites it has been estimated that "the nationwide proportionate

---

[44] The distribution of families by level of money income in the United States indicates that in 1968 over twice as many non-white families, in proportion to the total non-white population, (44.6%) fell into income ranges (under $4,999) eligible for low rent public housing than did white families in proportion to the total white population (19.9%). Department of Commerce, Bureau of the Census, *Current Population Reports*, Series P-60, Nos. 53 and 59. The incidence of poverty is more likely to fall on non-white families than white families. In 1968, using the poverty index of the Social Security Administration, over 28% of non-white families in the nation were poverty stricken, compared to only 8% of the white families. Table 33, 1968 HUD Statistical Yearbook, based on preliminary data of Department of Commerce, Bureau of the Census. See also National Commission On Urban Problems, *Building the American City* 45 (1968).

[45] Report of the National Advisory Commission On Civil Disorders 467 (1968). See also National Commission On Urban Problems, *Building the American City* 79 (1968).

need among nonwhties will be almost three times more acute than among the white majority. In 1978, one in every four non-white families will require some form of housing subsidy, compared to only one in every 12 white families."[46] This racial imbalance in housing opportunities makes it apparent that any restrictions which discriminate against low-income housing have a severely discriminatory effect on non-whites.

Appellant Shaffer points out that "only 1.4% of households (in Santa Clara County) of an income of $3,000 or less are Negro,"[47] but this statistic only demonstrates how few Negroes are able to live in Santa Clara County; for the same census data cited by Appellant Shaffer show that only 0.95% of the "non-poor" in Santa Clara County are Negro. To argue, as Appellant Shaffer does, that because Santa Clara County contains almost no non-whites it is not discriminating against them is as ironic as if the defendants in Gomillion v. Lightfoot[48] had argued that their gerrymandered county was not discriminating against Negroes because it contained no Negroes.

This situation is brought into focus by the President's recent finding that:

> "Community opposition to low- and moderate-income housing involves both racial and economic discrimination. Under the Open Housing Act of 1968, it is now illegal to discriminate in the sale or rental of most housing on the basis of race. Strict enforcement of this and similar statutes will help establish an atmosphere in which such discrimination will be the exception rather than the rule. *Nevertheless, the fact remains that it is difficult, if not impossible, in many communities to find sites for low- and moderate-income housing because the occupants will be poor, or will be members of a racial minority, or both. The consequence is that either no low- or moderate-income housing is built or*

[46] President's Committee on Urban Housing, *A Decent Home* 42 (1968).

[47] Brief of Appellant Shaffer, p.30.

[48] 364 U.S. 339.

that it is built only in the inner city, thus heightening the tendency for racial polarity in our society.[49]

Housing is a Basic Need

This Court has frequently recognized that adequate housing is a "necessary of life," [50] and in recent years, as Mr. Justice Blackmun noted three years ago, [51] the Court has "ruled against and struck down discriminatory housing practices in a number of instances," such as Shelley v. Kraemer,[52] Reitman v. Mulkey [53] and most recently Jones v. Alfred H. Mayer Co.[54] The result in each of these decisions demonstrates the validity of Mr. Justice Douglas' pronouncement that "Urban Housing is clearly marked with the public interest." [55]

Housing, by determining where one lives, also determines access to jobs, education and recreation. When a case involves such a basic human need, and the discrimination in regard to this need affects both racial minorities and the poor, this Court must be especially careful to sub-

---

[49] President's Second Annual Report on National Housing Goals, H.R. Doc. No. 292, 91st Cong. 2d Sess. 42 (1970). (Emphasis supplied.) The National Commission on Urban Problems has observed:

> The number of persons of Anglo-Saxon and European stock in the public housing projects, therefore, probably does not exceed two-fifths and might be as low as one-third if the figures were brought up to 1968. While these racial stocks form about half of the elderly, they comprise less than a third of the children. This is merely a quantitative appraisal of the actual facts without the slightest degree of judgment on the relative quality of the occupants. It does help, however, to explain some of the popular opposition to public housing. *Building the American City* 114 (1968).

The Commission also noted that some of the requirements for referendum in situations like the case at bar "are either open or convert means of excluding the poor and Negroes from white middle-class neighborhoods." *Ibid.* 191.

[50] Block v. Hirsh, 256 U.S. 135, 156; Shapiro v. Thompson, 394 U.S. 618, 627.

[51] Jones v. Alfred H. Mayer & Co., 379 F.2d 33, 40.

[52] 334 U.S. 1.

[53] 387 U.S. 369.

[54] 392 U.S. 409.

[55] Reitman v. Mulkey, 387 U.S. 369, 385 (concurring opinion).

ject such discrimination "to the most rigid scrutiny"[56] in search of some compelling state interest.[57] But in the instant case we have shown that there is not even a rational basis for the discrimination; it follows of necessity that the discrimination can hardly be required by any compelling state interest.

IV.

ARTICLE XXXIV DISCRIMINATES UNCONSTITUTIONALLY AGAINST THE CLASS OF LOCAL VOTERS WHO FAVOR PUBLIC HOUSING, BY DILUTING AND DEBASING THEIR POLITICAL VOICE.

In addition to infringing plaintiffs' interests in securing decent housing in a preferred location, Article XXXIV also violates their interest in free and equal access to normal political processes of their local communities. In San Jose, for example, the legislative power is entrusted to an elected city council,[58] and a referendum is required only for general obligation bond issues or for such extraordinary events as a change in the boundaries or form of government of the municipality.[59] It is thus clear that plaintiffs, and all other San Jose residents for whom public housing production is a dominant political concern, are placed by Article XXXIV at a relative disadvantage vis-a-vis citizens whose main demands on local government lie elsewhere. Those citizens have the opportunity of gaining satisfaction by successful engagement in city council politics. But public housing supporters, even if they have the political strength to hold their own in the council, get nothing unless they can also prevail with the electorate.

The interest in equality of opportunity to have one's preferences counted in political processes has, for reasons

---

[56] Korematsu v. United States, 323 U.S. 214, 216.

[57] McDonald v. Board of Election Commissioners, 394 U.S. 802, 806-07.

[58] See San Jose City Charter, as amended through June 2, 1970, Art. IV.

[59] *Id.*, §1219, 1221, 1700. See W. Crouch, *The Initiative and Referendum in California* 6 (1950). See also n. 39 *supra*.

which no longer need explaining, been accorded extraordinary weight by this Court in litigation under the Equal Protection clause. Systematic discounting of the political roles of identifiable groups—be they defined by race,[60] place of residence,[61] military status,[62] wealth,[63] property ownership,[64] or even tax delinquency[65]—has without exception been condemned by this Court. The *Reapportionment Cases* establish that the concerns of equal protection are not so blindly mechanistic as to be content so long as no one is prevented from casting his vote or having it fully counted. They show that it is not simply the total or partial withholding of votes which excites close scrutiny under Equal Protection, but rather any structural bias which systematically discounts the preferences of a legitimately interested group. The applicability of that principle to the very type of bias complained of by plaintiffs here—a selective and discriminatory referendum requirement—is demonstrated by Hunter v. Erickson.[66]

In such a case of systematically unequal political opportunity, the Court has made clear that it will demand of the state not only that an interest of compelling magnitude be advanced as justification, but also that the political inequality be as finely tailored to the fulfillment of that interest—as non-onerous a means of achieving it—as the situation will allow.[67] It is obvious that California cannot even remotely summon up such justifications for Article XXXIV. For, insofar as she professes concern for avoiding undesirable execution of public housing programs, she has available the alternative means such as those set forth at pp. 22-24 of this brief. And insofar as she professes concern for allowing the local population to correct a legislative failure to perceive or abide by overwhelming popular

[60] *E.g.*, Nixon v. Herndon, 273 U.S. 536.
[61] *E.g.*, Reynolds v. Sims, 377 U.S. 533.
[62] Carrington v. Rash, 380 U.S. 89.
[63] *E.g.*, Harper v. Virginia Board of Elections, 383 U.S. 663.
[64] *E.g.*, Cipriano v. Houma, 395 U.S. 701.
[65] Harper v. Virginia Board of Elections, 383 U.S. 663.
[66] 393 U.S. 385.
[67] Kramer v. Union Free School District, 395 U.S. 621.

sentiment against public housing, evenhanded application to public housing of California's normal type of *voluntary* referendum—which requires *opponents* to bear the onus of initiative and mobilization—will fully satisfy.

Citation of Hunter and Kramer should, indeed, be ample argument to sustain plaintiffs' claim of unconstitutional denial of equal political opportunity at the hands of Article XXXIV. We believe, however, that it may be helpful to the Court if we go on to examine in some detail the argument of Appellant Shaffer that, by objecting to submission of their preferred program to a community-wide vote, plaintiffs are seeking some kind of political preference which would relieve them of the normal burdens of being in a minority.

The creed and practice of democracy in this country have never focused exclusively on an electoral majority as the sole avenue to a measure's acceptance. Doctrine and practice are fully as receptive to the adoption of measures whose positive appeal is chiefly to minorities—but to *various* minorities. In this pluralistic perspective, the sense of the majoritarian limitation is to require that the general course of government shall command the assent of the majority; that the will of the majority shall not be systematically frustrated or subordinated to that of some particular minority; and that no minority faction shall be accorded a position of systematic dominance.[68] Majority rule—the precept of "one man, one vote"—does not, then, necessarily deprecate responsiveness to minority interests. What it does unquestionably condemn is a process so biased as to yield systematic and unjustified preference (or a subordination) of a particular minority's interest.

This is not to suggest that general responsiveness to minority interests is constitutionally required. No doubt California could, had she so chosen, have followed the model of the traditional New England town, where each

[68] See, generally, Robert A. Dahl, *A Preface to Democratic Theory*, Ch. 5 (1956).

and every measure must independently win the approval of a majority of the participating electorate in town meeting assembled. But neither California, nor San Mateo, nor San Jose has opted for this model. California has instead, as she was free to do, authorized for her localities a system of general government through popularly elected representatives.[40] And it is inextricably of the essence of such a system that interest-oriented minorities have the opportunity to push through measures which they strongly favor—even though those measures would not, by themselves, have won support from a majority of the electorate. If the minority who favor some particular measure care strongly enough about it, they have the opportunity to press for majority support from representatives who are either indifferent or tend towards mild opposition—possibly by promising support for measures favored by other minorities, possibly by moral suasion or logical demonstration, possibly by political "pressures." As regards decisions made in a representative body of limited size, this process is not only workable, but inescapable. But this process is prevented from working in relation to matters which, within an overall system of representative government, have been specially selected out of the regular legislative mill for occasional and isolated decision by the mass of voters.

The net effect of Article XXXIV, then, is that citizens for whom public housing is a high-priority item on the political agenda are deprived of a political opportunity which is generally and normally available to fellow citizens having different interests. For example, a group interested

[40] The form of government for "general law" cites is set forth in Cal. Gov. Code §§34850 ff., and 36500ff. It vests general legislative power in a popularly elected city council of five members, and allows such variations as a city manager or elected mayor on a local-option basis. In the case of cities, such as San Jose, which have chosen to exercise the "home rule" charter-making powers granted by Cal. Const. Art. XI, §8, the full range of choice has been delegated to the local level. San Jose's charter establishes a council manager form of government, with general legislative power vested in the popularly elected council.

in nursing homes and actively desiring a zoning change to accommodate that interest may possibly—though it be a clear minority of the local citizenry—accomplish its goal within the local governing body without any need for gaining the positive approval of the electorate.[70] Likewise for a group actively desiring, say, provision of a new municipal swimming pool. But a like opportunity is denied those whose main political interest at the local level is public housing. Just as in Hunter v. Erickson, "passage by the Council suffice(s) (for those who seek, or would benefit from, most ordinances regulating the real property market) unless the electors themselves invoke the general referendum provisions. . . . (Article XXXIV) obviously

[70] If the change is accomplished by the "administrative" action ("variance" or "exception") of, *e.g.*, a board of zoning appeals, no referendum is possible. If the change takes the form of "legislative" action (map change or amendment of permitted uses) by the governing body, it is subject to being overruled by a *post facto* referendum, organized at the initiative of the opponents. Cal. Const. Art IV, §1; see California Continuing Education of the Bar, California Zoning Practice §4.4 (1969). This was what was involved in SASSO v. City of Union City, 424 F.2d 291 (1970), mistakenly relied upon by appellants here. As this Court explicitly recognized in Hunter v. Erickson, *supra*, there is obviously an enormous practical difference between exposure to the risk that opponents of an amendment will bestir themselves successfully to instigate and follow through on a referendum procedure (a risk which is rarely realized), and the certainty which confronts public-housing protagonists that they will have to shoulder precisely that burden in order to get anything, ever. Neither the constitution, statutes, nor San Jose charter appear to insist on such as mandatory, prior-clearance type of referendum for any other type of public or private development. See n. 59, *supra*. If it were true, as suggested by appellants, that Article XXXIV was designed merely to fill a "gap" discovered in California's referendum policy (see Brief of Appellant Shaffer, pp. 6, 35-36) or to "nullify" the California Supreme Court's ruling that the normal, voluntary referendum procedure did not reach public housing (Brief of Appellants, p. 4)—the Article would merely have stipulated that decisions to build public housing were subject to being taken to referendum, like other actions of local government, if the opponents were willing and able to shoulder the burden. By so drastically overshooting this easy and obvious mark, Article XXXIV evinces a clear purpose to discriminate against the protagonists of public housing.

(makes) it substantially more difficult to secure enactment of (public housing authorizations)." [71]

It defies understanding how such a selective referendum requirement can be said to be "grounded in neutral principle;" [72] surely this is not what Mr. Justice Harlan meant by that phrase in his concurring opinion in Hunter v. Erickson. It is a strange "neutrality," which visits upon members of one sharply defined interest group a special and adverse disparity of treatment—a discrimination—a clear infringement of their fundamental right to have their voices equally heard and their influence equally weighed in whatever standard political processes have been ordained for the polities to which they belong.[73]

If the historic line of decisions from Baker [74] through Gray [75] and Reynolds [76] to Kramer [77] and Hadley [78] means anything, it means that the manner in which a state's people parcel out the exercise of its sovereignty *is* a question justiciable under the Fourteenth Amendment—and that, at the very least, once the state has established a general mode of participation by citizens in a governmental process, it may not bias that process in a manner that arbitrarily restricts the opportunities or dilutes the influence of any class of substantially interested citizens. The class composed of supporters of public housing is no

---

[71] 393 U.S. 385, 390.

[72] Brief of Appellant Shaffer, pp. 43, 55.

[73] The referendum provisions involved in Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), cert. denied, 397 U.S. 980 (1970); SASSO v. City of Union City, 424 F.2d 291 (9th Cir. 1970); and Spaulding v. Blair, 403 F.2d 862 (4th Cir. 1968), were on their faces "neutral," for they could be invoked on behalf of the opponents of *any* legislative measure, touching upon *any* interest which citizens might have. We would not agree that this feature is enough in itself to establish the correctness of the decisions in those cases; but it does clearly undercut the reliance placed on them by appellants and distinguish them from the present case, which involves a provision discriminatory on its face.

[74] Baker v. Carr, 369 U.S. 186.

[75] Gray v. Sanders, 372 U.S. 368.

[76] Reynolds v. Sims, 377 U.S. 533.

[77] Kramer v. Union Free School District, 395 U.S. 621.

[78] Hadley v. Junior College District, 397 U.S. 50.

less a discernible and coherent class than those composed of the residents of underrepresented districts in Reynolds, the military residents in Carrington [79] or the unpropertied citizens in Kramer and Houma.[80]. But by virtue of Article XXXIV, supporters of public housing do not "participate on an equal footing" [81] in the political process with supporters of other interests. The dilution and debasement of their influence is, if anything, more tangible and direct than that which flows from arithmetical malapportionment of representatives.

Contrary to appellants' assertion, the plaintiffs do not seek by this litigation to be assured of influence out of proportion to their "natural" political strength, as determined by numbers or any other relevant factors such as dedication, political skill, or moral force. They do not ask the courts to impose on their behalf any "equal" compromise with "the majority," or in any other way to overlook or relieve against their presumed "minority" situation. Plaintiffs ask, indeed, the very opposite: That the courts remove an unnatural and discriminatory impediment to their marshalling whatever natural political strength they have, and testing it against that of all other contenders for favorable attention *in the regular political forum.*

Thus the plaintiffs' cause flows with the main current of reapportionment and related voting-rights decisions. When this Court declared: "Citizens, not history or economic interests, cast votes," [82] it was of course not denying that a citizen values his vote (at least partly) as an instrument for realizing his interests; rather, the Court was explaining why an artificially unequal distribution of representation among citizens could not be justified by a legislative policy of equalizing the representation of interests in disregard of their numerical strength—by counting "land or

---

[79] 380 U.S. 89.
[80] Cipriano v. Houma, 395 U.S. 701.
[81] Hadley, supra, at 55.
[82] Reynolds v. Sims, 377 U.S. 533, 580.

trees or pastures" rather than voters. Plaintiffs here suffer precisely such an artificial dilution (and correlative inflation) of natural strength; and so they have no occasion to seek "equalization" of influence or response in disregard of natural strength. Nor do they, in any sense, seek protection for a "group" interest which is not also and at bottom an interest accruing to each of them as an individual. Each plaintiff, as an individual whose interest in public housing ranks high on his list of political priorities, suffers a restriction of political opportunity in comparison with any other citizen whose attitude towards public housing is one of indifference or opposition.

It is of course true that the foregoing remarks would apply whenever state law restricts or qualifies the power of local governments to act in specified ways or with regard to specified kinds of programs or objectives. The point is simply that the *Reapportionment Cases* and related voting-rights decisions have established beyond question that citizens have a legally protected interest in their access to the normal modes of political participation, at least in the sense that any restrictions or qualifications of that access must, as must other state law, satisfy the standards of equal protection. Whatever classifications such restrictions embody must be justified. With all respect to Appellant Shaffer, this is nothing like insisting that "the equal protection clause forbids a State from requiring voter approval of anything unless it requires voter approval of everything."[88] It is merely to insist that rules against unjustified classification apply to voter-approval requirements.

This means that if Article XXXIV's express distinction between publicly developed low-income housing and other housing fails to meet the applicable equal protection standard, its discriminatory narrowing of the political opportunities open to citizens favoring public housing in their localities denies those citizens equal protection. And the denial is no less real, and no less a violation of the

[88] Brief of Appellant Shaffer, p. 57.

Constitution, because the discriminatorily imposed burden consists of submission to a popular vote. It is not the voting procedure itself which is objectionable, but the discriminatory rule for invoking it, as this Court said in Hunter v. Erickson: "Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size. *Cf.* Reynolds v. Sims, 377 U.S. 533. . . ."[84]

V.

ARTICLE XXXIV UNCONSTITUTIONALLY BURDENS THE BASIC FREEDOM OF ALL PERSONS TO TRAVEL AND MIGRATE THROUGHOUT THE NATION.

In the depression of the 1930's California appeared as a ray of hope to many farmers from the "dust bowl" who had been wiped out by the severe droughts. These "Okies" packed their possessions and set out for the Golden State in search of new opportunities. The existing Californians, disturbed by this development, sought to stem the tide by stationing guards at the border and refusing to allow "indigents" to enter. This Court, in the landmark case of Edwards v. California,[85] held these restrictions unconstitutional.

California subsequently became, not more virtuous, but more subtle. California now excludes or quarantines the poor by severely restricting decent low-income housing through devices like Article XXXIV. But this Court has

[84] 393 U.S. 385, 392-93.
[85] 314 U.S. 160.

recently struck down a comparable device—residence requirements for welfare benefits—as an undue restriction on the right to travel,[86] and the restrictive effects of Article XXXIV are equally as great.

Under present economic conditions subsidized housing is as essential to a poor person's ability to migrate to a state or among localities within it as are welfare benefits. One of every eight families in our country live, like appellees, in pockets of urban and rural poverty;[87] because they cannot afford decent housing and insufficient public housing exists to accommodate their needs, they must live in overcrowded, run-down, rat- and vermin-infested dwellings. For even this sort of unsafe, unsanitary and demeaning housing, they are required to pay rents that are exorbitant in light of their income, with the result that they are deprived of other necessaries, such as clothing.[88]

That the housing crisis for the poor is urgent and continuing has recently been reiterated by still another study group, the President's Task Force on Low Income Housing:

> The housing problems of the United States, growing more difficult and more pressing all the time, are not limited to those faced by low-income families. Clearly, however, it is low-income families, and particularly low-income families living in ghetto areas of our cities, whose needs in this respect are greatest and most urgent. The conditions they face have been documented in one commendable research report after another and with the bulk of these findings, and with many of the action proposals based on them, this Task Force is in

---

[86] Shapiro v. Thompson, 394 U.S. 618.

[87] President's Committee on Urban Housing, *A Decent Home* 7 (1968): "About 56 percent (4.37 million) of today's 7.8 million house-poor families live in urban areas with 50,000 or more population.

"By 1978, in comparison, about 60 percent (4.5 million) of all families expected to require housing assistance will be urban dwellers. The numbers of urban poor will remain almost a constant, while the number of rural poor will decline."

[88] See A. 14-20, 62, 104-110.

> agreement. Certainly it shares the sense of urgency that earlier reports convey.[89]

Surely this Court needs no additional mass of statistics laid before it to take notice of the nation-wide shortage of housing for the poor.

Shelter costs represent the largest single item in the American family budget. Federal housing policy is intended to lower these costs through measures designed to increase the supply of housing for all income groups, including subsidies to help families defray shelter costs. Thus, homebuyers are allowed to deduct from income taxes interest paid on mortgages and real estate taxes. Veterans too are eligible for additional mortgage assistance; so are millions of other families whose incomes and credit standing qualify them for various kinds of FHA mortgage assistance and insurance programs. Similar assistance extends to persons in rural areas under the Farmers Home Administration.

Finally, at the bottom of the economic ladder are the poor, largely impotent to take advantage of the above subsidies. For families in this class, publicly-sponsored housing represents the major source (and in many places the only source) of decent shelter at a price they can afford to pay, because even the most advanced housing techniques will not allow private industry to meet the housing needs of low-income families without subsidy. "New housing, built by any presently conceivable method, is completely beyond the reach of the poor unless subsidized by the government."[90]

The President has recently commented upon this chronic inability of the private market to supply decent homes for low-income families:

---

[89] The President's Task Force on Low Income Housing, Toward Better Housing for Low Income Families vii (May, 1970).

[90] The Report of the President's Committee On Urban Housing, 11. So-called "filter down housing" is either substandard or beyond the price range which the poor can afford to pay. National Commission on Urban Problems, *Building the American City*, pp. 11, 93 (1968).

> Housing production has declined sharply in the past year, and over the past four years has been more than one million units short of the volume needed to keep pace with the nation's growing population and replace inevitable losses of dwellings. Insufficient progress has been made in replacing or rehabilitating some six million substandard units. Too many other units continue to be allowed to slip into disrepair.
>
> At the same time, costs of building, owning, or renting decent housing have risen sharply—indeed much faster than the rise in the overall cost of living. Financing costs are up the most, but costs of land, labor and materials are also much inflated. The median price of all conventionally built new homes now being offered for sale is about $27,000. Nearly half of all American families probably cannot afford to pay much more than $15,000 for a home, yet today the only significant amounts of new housing available in that price range are mobile homes.[91]

It was in recognition of "unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income, in urban, rural nonfarm, and Indian areas, that are injurious to the health, safety, and morals of the citizens of the Nation," that Congress passed the United States Housing Act of 1937 implementing the public housing program.[92] Of all the federal housing legislation, the public housing program remains the only one which reaches the needs of the poorest members of our society. Other housing programs are designed in fact to begin where public housing leaves off—as a practical matter the maximum income limits for

---

[91] President's Second Annual Report on National Housing Goals, H.R. Doc. No. 292, 91st Congress, 2d Session, April 2, 1970.

[92] 42 U.S.C. §1401 (1969). Both the House and Senate Reports on the Housing Act of 1949 also recognize that in many areas private enterprise would be unable to meet low-income housing needs. Report from the Committee on Banking and Currency, House Report #590, 81st Congress, 1st Session, at 43; Senate Supplemental Report, 81st Congress, 1st Session, Report 84 Pt. 2, Calendar #71, at pp. 8-9. A provision for a local finding that private enterprise is unable to meet low-income housing needs has remained a part of the federal housing programs.

public housing become the minimum income limits for participation in other programs, such as the 221(d)(3), 235 and 236 programs.[93]

Because housing for the poor is in extremely short supply, and because it can only be effectively provided through the federal public housing program, it follows inexorably that by placing restrictions on public housing that are not placed on housing for groups other than the poor, a state can as effectively prevent the in-migration of the poor, as through the use of the blatant prohibitions in Edwards or the prior residence requirements in Shapiro. Thus Article XXXIV is as serious an incursion upon civil rights as the restrictions struck down by this Court in those cases, and this Court has made it perfectly clear that it will not permit states to substitute indirect discrimination for direct discrimination:

> Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettoes and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.[94]

That the right to migrate freely throughout the country in search of new opportunities is a basic civil right can no longer be disputed. Freedom from arbitrary government restriction of the right to travel if and where one chooses within the country, while not expressly declared in the Constitution, has long been implicit in our form of government.

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part

[93] See National Commission on Urban Problems, *Building the American City* 115, 143-150, 174-176 (1968).

[94] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 442-43.

of it without interruption, as freely as in our own states.[95]

In its essence the right to travel is one of the most important of all the rights of United States citizens. In Shapiro v. Thompson the Court pointed out "that the nature of our federal union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land . . .," [96] and that the right to travel has a status equivalent to those rights explicitly protected by the first ten amendments:

> "We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that, as MR. JUSTICE STEWART said for the Court in United States v. Guest, 383 U.S. 745, 757-758 (1966):
>
> " 'The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.
>
> " '. . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.' " [97]

---

[95] Taney, C. J., in Passenger Cases, 7 How. (48 U.S.) 283, 492.

[96] 394 U.S. 618, 629.

[97] *Id.* at 630-631. That the right to travel is equivalent to a freedom guaranteed by the Bill of Rights was reiterated by this Court last term in Dandridge v. Williams, 397 U.S. 471, 484, where the Court distinguished "state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights," from the regulation in Shapiro v. Thompson "where, by contrast, the Court found state interference with the constitutionally protected freedom of interstate travel." Just as the right to travel prevents communities from arbitrarily excluding poor persons, it also prevents a community's forcing poor persons to migrate elsewhere in search of decent housing. *Cf.* Western Addition Community Organization v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Note, The Interest in Rootedness: Family Relocation and an Approach to Full Indemnity, 21 Stan. L. Rev. 801 (1969).

Although the term "right to travel" has been used in these cases, the holdings of the cases might better be described as involving a "right to migrate and settle." Obviously the welfare residency requirements there invalidated did not restrict potential recipients from moving through the state but from migrating to and settling permanently in the state, and it is this right to migrate and settle that is as effectively impinged by restrictions on low-income housing as by welfare residency requirements. As the Court said in Shapiro, "The purpose of inhibiting migration by needy persons into the State is constitutionally impermissible."[98]

The right to travel does not mean that every community should be forced to build an unlimited supply of public housing to attract as many low-income persons as possible, just as it does not mean that a state must grant unlimited welfare benefits to attract poor people.[99] But when the state adopts a program of social welfare it must be careful that the program is administered both by itself and its subdivisions so as not to intrude upon fundamental constitutional rights. The State of California has granted to local government the right to plan for and regulate all types of land use through zoning, housing, building and subdivision codes. Local governments may use these powers to establish locations for housing and determine its physical characteristics. Using such regulations in a reasonable manner, the State of California and its local governments may control all aspects of housing that are legitimate subjects of government regulation.

But when California supplements these regulations with special *ad hoc* laws designed to impose additional restrictions on public housing for persons of low income, it is clear that the State is seeking to impose indirectly the same restrictions on immigration of indigents that this Court struck down in Edwards almost 30 years ago.

---

[98] 394 U.S. at 629.

[99] Shapiro v. Thompson, 394 U.S. 618.

VI.

THE EFFECT OF CALIFORNIA'S REQUIREMENT THAT EACH LOW-INCOME HOUSING PROJECT HAVE LOCAL APPROVAL HAS BEEN TO CONFINE THE POOR AND MINORITY GROUPS TO THEIR EXISTING AREAS OF RESIDENCE IN VIOLATION OF THEIR RIGHT TO EQUAL PROTECTION OF THE LAWS.

We have suggested in Argument V that to subject low-income public housing, and only such housing, to a project-by-project approval procedure is to discriminate invidiously and injuriously on the basis of wealth, thereby obstructing freedom of travel and settlement, without constitutionally acceptable justification. If that suggestion is correct, it applies not only to the *referendum* requirement of Article XXXIV, but also to the other provisions in California's Housing Authorities Law which require ad hoc local governing body approval of public housing.[100] For these latter requirements are no less discriminatory and injurious to the poor than is the former: Developers of housing for the non-poor need merely comply with generally applicable zoning and building laws; only public developers of housing for the poor are automatically required to gain special approval from the local governing body, just as only they need special approval from the electorate.[101]

Yet Article XXXIV would be unconstitutional if it stood by itself—if the requirement for local governing body approval did not exist. Nor is Article XXXIV any the less unconstitutional, nor any the less ripe for invalidation in the pending cases, because in actuality it is a contributing and compounding cause, rather than the sole cause, of injury. Indeed, plaintiffs in these cases lack specific occasion to attack the requirement for local governing body approval, inasmuch as it appears that such approval would have been forthcoming for the public housing location in

[100] Cal. Health & Safety Code §§34208; 34240; 34313.

[101] Cal. Health & Safety Code §34313. See, generally, point I of this brief.

which they are specifically interested.[102] A further reason for dealing with the local approval requirements one step at a time is that the referendum requirement does incorporate one special constitutional vice not shared by that for governing body approval—that is, its effect, as elaborated in Point IV of this brief, of debasing the political roles of public housing supporters. In sum, it seems clear that the present challenge to Article XXXIV can and should be upheld without having to reach the broader issues raised by California's practice of allowing a community's accommodation of public housing to be determined by totally discretionary local option, whether at the level of the governing body or of the electorate.

Even so, amici feel constrained to lay before the Court their beliefs that unfettered local-government option is a key element in the system of state and local laws that have created and are maintaining two societies, separate and unequal, one confined to ghettoes, one free to live where it chooses; and that this entire system of keeping the poor in their place (by, among other practices, providing public housing for them there but not elsewhere) violates their right to equal protection of the laws.

The practical effect of the local option restrictions imposed on the public housing program by California can be seen by examining the record of public housing in the San Francisco Bay Area and noting its location. The construction of public housing is confined largely to older urban core areas and black ghettoes, while jobs and population growth are rapidly moving out to the suburbs. The table on pp. 55-56 shows that virtually no public housing has been constructed in the primarily white, suburban portions of the Bay Area such as Santa Clara County (in which has no public housing whatsoever been built), San Mateo County (in which one project of 40 units has been built in South San Francisco), and Marin County (in which 363 public housing units have been constructed, 299 of which are

[102] A. 25-27, 122-24.

located in Marin City in the only black ghetto in the county).

The counties in the Bay Area in which substantial amounts of public housing have been built are those containing the older core cities of San Francisco and Oakland, with large non-white and minority group populations: i.e., the City and County of San Francisco with 5,777 public housing units, and Alameda County with 2,401—all of the latter located in Oakland. Contra Costa County has 1,831 units, with 876 located in a black ghetto in the Richmond area immediately north of Oakland, and an additional 312 in Pittsburg, which has a 14% non-white population. The remainder of the Contra Costa County units are scattered in small projects throughout the county, many of them in the farming communities of the eastern portion of the county (Antioch, Brentwood, Oakley).[103]

Public Housing Constructed in San Francisco Bay Area [104]

County & City	*Population*	*Non-white Population*	*Housing Units*
San Francisco (City & County)	740,316	135,788(18%)	5,777
Alameda	912,600	139,023(15%)	2,401
Oakland	367,548	92,399(26%)	2,401
Contra Costa	413,200	29,864(7.2%)	1,831
Antioch	19,170	40(.2%)	37
Brentwood	6,620	166(2.5%)	44
Martinez	4,189	17(.4%)	102
Oakley	4,998	55(1.1%)	70
Pittsburg	19,062	2,716(14%)	312
Richmond	71,854	15,353(21%)	876
Rodeo	6,677	261(3.9%)	250
San Pablo	23,920	384(1.6%)	140
Marin	148,800	5,450(3.7%)	363
Homestead Valley	6,352	94(1.5%)	28
Marin City	2,519	1,186(47%)	299
Santa Venetia	4,771	16(.3%)	36

[103] Outside of suburban areas a substantial amount of public housing has been built in small rural towns. See Report of the National Commission on Urban Problems, pp. 112-13 (1968). Much of this housing is used to house migrant farm laborers and elderly local residents.

[104] Population figures are drawn from the 1960 census. The statistics on public housing are primarily from U.S. Dept. of Housing and Urban Development, *Low-Rent Project Directory*, Dec. 31, 1969. Updated public housing statistics (to July 15, 1970) were provided by letter of September 15, 1970 from Robert Johnson, Region VI Deputy Assistant Regional Administrator, U.S. Dept. of Housing and Urban Development.

County & City	Population	Non-white Population	Housing Units
San Mateo	449,100	19,216(4.2%)	40
South San Francisco	39,418	670(1.7%)	40
Santa Clara	658,700	20,567(3.2%)	0

If only the units authorized since December 24, 1950, are considered, the same pattern appears.

Jurisdiction	Number of Units Authorized to be Constructed Since Dec. 24, 1950
Benecia	75
Homestead Valley Area	28
Marin City	300
Martinez	50
Northgate Area	40
North Richmond Area	150
Novato	40
Oakland	1,064
Richmond	150
San Francisco	1,610
San Pablo	40
Santa Venetia Area	36

Of the 3,479 total units, 2,674 were built in the older central cities of San Francisco and Oakland.[105]

The Kerner Commission warned us that "white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it."[106] The low-income housing program has been one of these institutions. By giving each community a veto power which may be used to prevent the construction of low-income housing within its boundaries, we have permitted the program to be used to reinforce existing patterns of segregation. In communities where minority groups do not now live, local governments continue to exclude them by refusing to permit low-income housing to be built.

Most of the projects have been built in inner city areas. Thus, at a time when increasing numbers of job opportunities are in the suburbs, the poor find that the

[105] U.S. Dept. of Housing and Urban Development, S-11A, Consolidated Development Directory, June 30, 1969, pp. 30-46.

[106] Report of the National Advisory Commission on Civil Disorders, p. 2 (1968).

only housing they can afford, be it public or private, generally is located in the inner-city.[107]

Only in the existing ghettoes is there political support for low-income housing, so in the ghettoes it continues to be built, increasing the already high rate of overcrowding[108] and creating a greater oversupply of applicants for a dwindling number of central city job opportunities. As the Kerner Commission pointed out, "future jobs are being created primarily in the suburbs, but the chronically unemployed population is increasingly concentrated in the ghetto. This separation will make it more and more difficult for Negroes to achieve anything like full employment in decent jobs."[109]

The plaintiffs have a constitutionally cognizable interest in freely choosing where they will live. That interest is not, of course, absolutely protected against any and all impediment by state action. It is, however, protected against state interference which discriminates arbitrarily, capriciously, or invidiously. For example, persons may not be fenced out of a particular residential area,[110] or a particular city or

---

[107] Report of the President's Commission on Income Maintenance Programs 132 (1970); see also Alvin L. Shorr, Slums and Social Insecurity 110-11 (1963):

"If public housing is the vessel, perhaps Congress is the vintner, but one must ask about the grape and the palate of the taster. The recipe for populating a city of which we have spoken, concentrates Negroes in public housing as in slums. Segregation is not entirely new, of course, but since 1954 it has become a more open insult. To the extent that public housing found its sites chiefly in land cleared for renewal, large areas were devoted exclusively to public housing (St. Louis is an example). To the extent that the growing suburbs successfully resisted public housing, they confined it to the city core. Meanwhile, as between 1935 and 1960, there was a great proportion of Americans who had never experienced poverty personally or were trying to forget it. They contributed to a more critical, if not pious, public view of public housing. Thus, a conjunction of social and economic trends leads to the setting apart of families in public housing."

[108] See National Commission on Urban Problems, *Building the American City* 77-78 (1968).

[109] Report, n. 106 *supra*, p. 406.

[110] *Cf.* Buchanan v. Warley, 245 U.S. 60.

county[111] because of their race; no more may they be fenced out because of low income.[112]

Separate neighborhoods are even less equal than separate schools. They deprive minority groups not only of equal educational opportunity but of equal access to jobs.

Appellant Shaffer argues that it is of no concern to this Court how a state divides its power among local governments.[113] But a state may not evade its duty to provide equal protection by abandoning its responsibilities or its decisions to local government. As stated to this Court by former Solicitor-General Archibald Cox:

> The fundamental guarantee of equal treatment at the hands of the State cannot be thwarted by the fragmentation of decision making. . . . [T]he constitutional obligation binds the State itself and it cannot be avoided by delegating to others the power to make the discriminatory decision. So long as the State remains involved, no abdication of authority will avail, even when power is transferred to private hands. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725; Cooper v. Aaron, 358 U.S. 1, 19. Cf. Terry v. Adams, 345 U.S. 461. *A fortiori*, the State cannot insulate itself from responsibility for a decision which results in individous descrimination by a surrender in favor of its own political subdivisions. That would be like permitting the principal to escape liability by appointing agents. Nor does it matter if the local majority indicates a willingness to forego the benefit of the Equal Protection Clause. 'One's right to life, liberty and property . . . and other fundamental rights may not be submitted to the vote; they depend on the outcome of no elections.' Board of Education v. Barnette, 319 U.S. 624, 638, See Boson v. Rippy, 285 F.2d 43, 45 (C.A. 5).[114]

The application of these principles to the case of public housing is illuminated by Griffin v. County School Board of Prince Edward County.[115] There the State of Virginia

---

[111] See Gomillion v. Lightfoot, 364 U.S. 339.

[112] Edwards v. California, 314 U.S. 160.

[113] Brief of Appelant Shaffer, p. 54 et. seq.

[114] Brief of the Solicitor General in Griffin v. County School Board of Prince Edward County, 377 U.S. 218.

[115] 377 U.S. 218.

tried to let its counties decide for themselves whether to operate public schools, or abandon them and substitute a system of private school tuition grants which would have the effect of maintaining segregated schools. This Court held that the state could not thus evade its obligation to provide education in a manner consistent with the equal protection clause:

> Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.[116]

Similarly, territorial discrimination against potential recipients of low-income housing in large areas of California cannot stand unless some rational basis in local conditions can be offered to justify the discrimination, and "grounds of race and opposition to desegregation do not qualify." As this Court stated in Hunter v. Erickson:

> Likewise, insisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which would otherwise violate the Fourteenth Amendment.[117]

Appellant Shaffer argues that the presence or absence of low-income housing in various areas of California is merely an unimportant or minor variation which can be safely left up to local whims, like the sale of beer. The states are laboratories of experimentation, she says, whose scientific studies should not be disturbed by judicial meddling.[118] But the result of this experiment has become all too clear. "To continue present policies is to make permanent the division of our country into two societies; one, largely Negro and poor, located in the central cities; the other, predominantly white and affluent, located in the suburbs and in outlying

[116] 377 U.S. 218 at 231.
[117] 393 U.S. 385, 392.
[118] Brief of Appellant Shaffer, p. 57.

areas."[119] The legitimate desire for state experimentation does not justify experiments in segregation.

We recognize that California has a substantial interest in realizing values of local self-government for their own sake, and that considerable room for variation in many locally determined services and programs can thus be justified. However, as illustrated by Griffin, supra, this interest cannot in and of itself justify totally arbitrary differences, among localities in California, with regard to governmental involvement in satisfying a human need as essential as that for decent housing. It is most important to note that California has made not the slightest attempt—either by enacting general standards to govern local decisions concerning public housing or by providing administrative guidance to local units—to ensure that any variations in local receptivity to public housing will reflect even plausible variations in local conditions. On the contrary, California has, by adding the peculiarly intractable form of "local option" required by Article XXXIV, done its best to guaranty that arbitrary and capricious differences in the administration of the program will exist.

However, we need not rely here on our own characterization of housing as a need of such unusual state-wide importance as to make improper a degree of local independence and variation which in other contexts would be unobjectionable. Such a characterization of the public housing program is California's own. The California Supreme Court has repeatedly recognized that the public housing program in California is a state program, in which local municipalities and housing authorities have a purely administrative role. "(T)he city under the Housing Authorities Law is an agency of the state, functioning under state law to fulfill state purposes, and is not acting pursuant to its fundamental law to effect solely municipal objectives. . . . The city and the Housing Authority function as ad-

[119] Report of the National Commission On Civil Disorders, p. 22 (1968); President's Second Annual Report on National Housing Goals, n. 50 *supra*.

ministrative arms of the state in pursuing the state concern and effecting the legislative objective." [120]

But, Appellant Shaffer argues, the policy of local control is consistent with the federal statutes.[121] In answer, we suggest that the United States is not free to embark upon programs in a manner which permits or requires invidious discrimination at the state or local level. "Congress may not authorize the States to violate the Equal Protection Clause." [122] If a requirement of local approval, applicable to low-income public housing but no other housing, is a denial of equal protection when instigated at the state or local level, it is no less such a denial when instigated by the United States. The United States may not thus absolve state and local governments of their constitutional duties—any more than it might, in the wake of Shapiro v. Thompson,[123] validly require states to impose one-year "waiting period" regulations as a condition of receiving federal support for public-assistance programs.

This case throws into sharp relief the blatant inequities of a system under which Federal housing subsidies are made available for the poor in California only on the sufference of local public action while subsidies for those with higher incomes flow unhampered by the need to obtain public approval of the subsidy.

The Federal Housing Administration programs, acting through private mechanisms, have made decent housing a reality for millions of Californians. FHA mortgage insurance has made longer term home mortgages with lower down payments possible for white middle class suburbanites. FHA multifamily mortgage insurance, based on longer term, high ratio loans, has brought rents down in

---

[120] Housing Authority of City of Los Angeles v. City of Los Angeles, 38 Cal. 2d 853, 243 P.2d, 515, 519 (1952).

[121] Brief of Appellant Shaffer, p. 52.

[122] Shapiro v. Thompson, 394 U.S. 618, 641. See *e.g.*, Simpkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 969 (4th Cir. 1963), *cert. denied*, 376 U.S. 938. *Cf.* Hurd v. Hodge, 334 U.S. 24, 35-36; Bolling v. Sharpe, 347 U.S. 497, 500.

[123] 394 U.S. 618.

garden apartments for these same beneficiaries. And Congress has enacted new subsidies, through FHA, for lower middle income or middle income persons.[124]

The central point is that no local approval requirements automatically break or interrupt the transmission belt for Federal housing subsidies or benefits to Californians who are anything but poor. Californians who are not poor accordingly enjoy a continual flow of Federal housing benefits. By the end of 1968, the number of FHA insured mortgages in California equalled 1,491,217, an increase of 319% over the number in 1950. This should be contrasted with the slow growth of the public housing program in the State.[125]

What has been said about California's own assumption of initiative in the public housing field will also make clear why we need not suggest that there is any affirmative legal obligation on California to become involved with public housing in the first place, or even that California must insist that all of its localities keep up with any one of them which might take the lead in providing housing. California has decided for herself to establish a public housing program capable of satisfying a state-perceived need, and it is her obligation not to permit the quiet nullification by local government of a state program established to deal with a

---

[124] For a history, description and comparison of U.S. housing subsidies, see Report of the President's Committee on Urban Housing 53ff. (1968). It is interesting to note that Congressional opponents of the rent supplement program, the only FHA subsidy serving beneficiaries in public housing income ranges, have written local approval requirements into Federal law in an effort (largely successful) to cripple the program. *Ibid* 65.

[125] It is instructive to compare the FHA statistics for New York and California with the comparable figures in those States for public housing as set forth in n. 4 *supra*.

	Dec. 31, 1950	Dec. 31, 1968
FHA insured mortgages in Cal.	467,315	1,491,217
FHA insured mortgages in N.Y.	218,812	695,707

FHA 17th Annual Report (Year Ending Dec. 31, 1950) 31, 73; 1968 HUD Statistical Yearbook 98. Unlike public housing, which grew substantially in New York but not in California after 1950, the FHA programs grew by almost identical rates in each State (California by 319%, New York by 318%).

pressing, dramatic problem confronted by the poor throughout the entire state.

CONCLUSION

We have tried to show how this case fits into the context of the overall low-income housing picture as seen by national and regional organizations deeply concerned over the serious effects of our current housing policies. Pervading both this case and the larger picture is the bitter resistance of large elements of white middle class suburbia to equal housing, employment and education opportunities for members of minority groups.

This depth of antagonism on the part of the white middle class to the poor minorities has continually immobilized our nation's search for a solution to the worsening racial crisis through federal or state legislation. As Dr. Kenneth B. Clark has stated:

> I read that report . . . of the 1919 riot in Chicago, and it is as if I were reading the report of the investigating committee on the Harlem riot of '35, the report of the investigating committee on the Harlem riot of '43, the report of the McCone Commission on the Watts riot. I must again in candor say to you members of this Commission—it is a kind of Alice in Wonderland—with the same moving picture re-shown over and over again, the same analysis, the same recommendations, and the same inaction.[126]

By giving Article XXXIV the same exacting scrutiny that it gave to restrictions on equal housing opportunities in Shelley v. Kraemer,[127] Reitman v. Mulkey,[128] and Jones v. Alfred H. Mayer & Co.[129] this Court will assure that the Constitution does not become an ally to this vicious circle of inaction.

---

[126] Report of the National Advisory Commission On Civil Disorders, p. 483 (1968).
[127] 334 U.S. 1.
[128] 387 U.S. 369.
[129] 392 U.S. 409.

FRED P. BOSSELMAN
122 South Michigan Avenue
Chicago, Illinois 60603

FRANK I. MICHELMAN
Langdell Hall
Cambridge, Massachusetts 02138

Of Counsel:

CHARLES L. EDSON
1430 K Street, N.W.
Washington, D.C. 20005

HERBERT M. FRANKLIN
2100 M Street, N.W.
Washington, D.C. 20037

October, 1970